

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No.: 3:00-CR-400-P
v.)	
)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and)	
BENNETT T. MARTIN,)	
)	FILED: January 16, 2002
Defendants.)	

UNITED STATES' MOTION AND BRIEF IN SUPPORT
REQUESTING WAIVER OF CONFLICT OF INTEREST PURSUANT TO *GARCIA*

I
INTRODUCTION

At the pretrial conference on January 9, 2002, the United States raised the issue of a conflict of interest involving defense counsel's intent to call one of their law partners, Alan Hostetter, as a witness at this trial. This Motion is being raised pretrial so that the Court can determine if the conflict rises to the level of requiring a disqualification of defense counsel from this case in the event that Hostetter testifies, or, at a minimum, requiring the defendants, Bennett T. Martin and Martin News Agency, Inc., to make an informed and knowing waiver in open court acknowledging that they fully understand the nature of the conflicts and waive them. The issue of conflict is exacerbated in that Hostetter represented the defendants during the charged conspiracy period of 1990 through 1995. As spelled out fully in the separately filed *United States Motion and Brief In Support of Discovery*, if Hostetter testifies, his and the defendants' ability to maintain confidential privileged communications and work product is eviscerated. This

may work substantially to the detriment of the defendants. They should acknowledge their awareness of this conflict and be required to waive it in open court.

A. CALLING HOSTETTER AS A LAWYER-WITNESS CREATES A CONFLICT UNDER RULE 1.06 OF THE TEXAS RULES OF PROFESSIONAL CONDUCT

The United States is not interested in delaying this trial. It needs to be tried. But, as highlighted at the pretrial hearing, the United States is concerned about Hostetter's dual role as a current law partner and associate of Michael Gibson and Richard Anderson in the law firm of Burleson Pate on the one hand, and as a fact witness for the defendants on the other hand. Rule 1.06 of the Texas Rules of Professional Conduct states:

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall **not** represent a person if the representation of that person:
 - * * *
 - (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person ***or by the lawyer's or law firm's own interests.***

Id. (Emphasis added).

As raised at the pretrial hearing, the United States wants to know how the defendants and defense counsel intend to get around Rule 1.06. Defense counsel argued that Hostetter became a member of Burleson Pate after the charged conspiracy. But this argument is meritless. Rule 1.06(b)(2) concerns present conflicts caused by a lawyer's affiliation with a law firm. Hostetter presently is a member of the law firm that represents the defendants in this trial. It also is obvious that Hostetter has a stake in the outcome of this trial, as does his present law firm and partners. Hostetter, as a member of Burleson Pate, shares in its profits, along with Gibson. Even

more, common sense dictates that neither Hostetter nor his law partners have an interest in losing this case. Might Hostetter's employment, economic, professional and personal ties to his firm and its law partners shape his testimony? The better question is, why should the government, also entitled to a fair trial, be placed in that position?

Hostetter is not a neutral witness. This much is demonstrated by his willingness to allow his law partners to rummage through his files searching for favorable defense evidence, while asserting work product privilege when the government wishes to review those same files. (Defense counsel found at least four helpful Hostetter documents which they have refused to disclose to the government, first listed in their Exhibit list, but now apparently withdrawn.) There is always a danger when a lawyer testifies that the jury may attribute too much weight to his testimony, or cause the jury to look more favorably on his law partners. Even more so where Hostetter has demonstrated a bias to defense counsel over the government.

As if this were not enough, Hostetter's divided loyalties are exacerbated by his having been the lawyer for Ben Martin and Martin News during the charged conspiracy period. His duties and loyalties to the defendants are not broken and undoubtedly will influence his testimony. His testimony and performance at trial as their former lawyer may unduly influence the jurors' perception of the defendants, which works to prejudice of the government.

Wheat v. United States, 486 U.S. 153 (1988), is the seminal case for analyzing whether an attorney or law firm should be disqualified for a conflict of interest. Though Wheat involved a multiple representation case, its principles run much broader. In Wheat, the Supreme Court made it clear that some conflicts are not waiveable and that the Sixth Amendment does not entitle a defendant to be represented by a lawyer or law firm of his choosing when that lawyer or

law firm has a conflict of interest that undermines the integrity of the judicial system. Here, the United States believes that the conflict of interest reaches that level.

At a minimum, the defendants should be required to make a knowing and intelligent waiver of any conflict of interest between their lawyers and them. This waiver should be made in open court. The government has a right to protect its conviction, if the jury so convicts.

Accordingly, the United States requests that the Court require the defendants pretrial to make a knowing and voluntary waiver of any conflict of interest consistent with United States v. Garcia, 517 F.2d 272, 274 (1975).

III
CONCLUSION

For the foregoing reasons, the United States requests that this Court consider whether the conflict of interest identified at the pretrial and discussed in this Motion requires a disqualification of defense counsel. At a minimum, the United States requests that this Court require the defendants in open court to give their knowing and informed consent waiving any conflict of interest.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

This is to certify that the undersigned attorney left a telephone message with Michael P. Gibson, counsel for Bennett T. Martin, and Richard A. Anderson, counsel for Martin News Agency, Inc., on January 15, 2002, advising them of this Motion, and the undersigned lawyer represents to the Court that the defendants oppose this Motion.

SIGNED this 15th day of January, 2002

“/s/”

RICHARD T. HAMILTON, JR.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 15th day of January, 2002. In addition, copies of the above-captioned Motion were served upon the defendants via Federal Express on this 15th day of January, 2002.

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